SUPREME COURT, U.S.
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No. 91-1859

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

INDUSTRIAL HELICOPTERS, INC.,

Defendant-Petitioner,

v.

MICHAEL J. GREEN,

Plaintiff-Respondent.

UNITED STATES FIDELITY & GUARANTY CO.,

Plaintiff-Intervenor-Respondent.

ON WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

BRIEF OF PLAINTIFF-RESPONDENT IN OPPOSITION

KARL W. BENGTSON
Louisiana Bar # 2942
SHELTON AND LEGENDRE
2448 Johnston Street
Post Office Drawer 52548
Lafayette, Louisiana 70505
(318) 233-7084

Attorneys for Plaintiff-Respondent, Michael J. Green.

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Washington, D.C. • THIEL PRESS • (202) 328-3266

QUESTION PRESENTED

Whether a substantial federal question is raised by the Louisiana Supreme Court's application of Louisiana Civil Code Article 2317 to a personal injury claim which involves three citizens of Louisiana, and arising out of a contract for carriage confected in Louisiana for a flight to begin and end in Louisiana by means of a helicopter hangared and maintained in Louisiana, but which accidentally terminates in the Gulf of Mexico?

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ON WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

BRIEF OF PLAINTIFF-RESPONDENT IN OPPOSITION

Plaintiff-Respondent respectfully suggests that this Court should refuse to grant certiorari in this matter. The instant case does not fall within the jurisdiction *exercised* by this Court. There are certainly federal maritime issues involved herein, however, they do not constitute "substantial federal questions".

In addition to this suggestion of lack of jurisdiction, Plaintiff-Respondent raises objections to the Defendant-Petitioner's formulation of the Question Presented, its Statement of the Case, and its Appendix.

OBJECTION TO PETITIONER'S ASSERTION OF THE QUESTIONS PRESENTED

Defendant-Petitioner has asserted that this Court is called upon to determine "whether Louisiana can create a new maritime cause of action". The court below did not "create a new maritime cause of action", nor did it base its decision on an expansion of maritime law. Rather it reasoned that La. C.C. art. 2317 was not excluded by contrary federal legislation, by the characteristic features of the general maritime law, nor by required maritime uniformity (Appendix A, p. A-20). The decision of the Louisiana Supreme Court below specifically provides that:

> . . . we . . . hold that Article 2317 applies as a supplement to the remedies available under the general maritime law in this maritime personal injury case, *since Article 2317 does not impermissibly conflict with the substantive general maritime law.* (Appendix A. p. A-2, emphasis added).

Since Louisiana law was not excluded, Article 2317 affords plaintiff a remedy in this action.

OBJECTION TO PETITIONER'S STATEMENT OF THE CASE

Defendant-Petitioner has failed to include in its Statement of the Case the facts which were of primary import to the courts below in reaching its decision.

> Louisiana has a strong interest in applying its own law in this case: Plaintiff is a Louisiana resident,

> Industrial a Louisiana corporation, the pilot a Louisiana resident, and the helicopter was stored in a Louisiana hangar. The contract of carriage between plaintiff's employer and defendants was confected in Louisiana. The mission started in Louisiana and was to end in Louisiana. Plaintiff and defendants, more likely than not, expected to be governed by Louisiana law. (Appendix A, p. A-6).

Other facts specifically cited by the courts below but deleted from Petitioner's Statement of the Case are that the accident occurred off the coast of Louisiana and shortly after the helicopter was refueled at an Exxon platform, off the Louisiana coast (Appendix A, p. A-2, 3). The platform is an artificial island used for oil and gas exploration and production. It is governed by the law of Louisiana as surrogate federal law per the mandate of OCSLA.

Petitioner's Statement of the Case is also deficient in that it fails to make clear that maritime law was never raised until after Defendant-Petitioner had lost at trial and on its appeal to the Louisiana Court of Appeals. Plaintiff did not bring his action under maritime law, nor did Defendant-Petitioner raise maritime law before the trial court. Plaintiff's petition made no reference to maritime law. Defendant-Petitioner's answer made no reference to maritime law. Pre-trial briefs and post-trial briefs by all parties made no reference to maritime law. Plaintiff's appeal made no reference to maritime law. Defendant-Petitioner itself filed an Answer to Appeal, seeking affirmative relief, asserting *state law* defenses, not maritime law. Only after it was denied relief under state law, did Defendant-Petitioner attempt to avoid liability by raising maritime law.

OBJECTION TO PETITIONER'S APPENDIX

Plaintiff-Respondent objects to the inclusion in the Appendices, of copies of Defendant-Petitioner's Appellate briefs while excluding therefrom copies of the Appellate briefs of Plaintiff-Respondent and of Plaintiff-Intervenor-Respondent.

STATEMENT OF THE CASE AND ACTION OF THE COURTS BELOW

On November 26, 1984, MICHAEL J. GREEN was employed by Southern Petroleum labs. His employer contracted with Industrial Helicopters, Inc. for helicopter transport for Mr. Green. The pilot was Industrial Helicopter's employee, Doug Wright. Both companies and both individuals are domiciled in Lafayette Parish, Louisiana. The helicopter was hangared, inspected and maintained by employees of Industrial Helicopters at its facilities in Lafayette Parish, Louisiana. The flight was to begin in Milton, Lafayette Parish, Louisiana, fly to offshore platforms, and return to Milton. En route, the helicopter refueled at a fixed offshore platform located off the coast of Louisiana. Shortly after lifting off, and as a result of a mechanical failure of the helicopter's governor mechanism, the craft was forced to make an emergency landing (crash) into the Gulf. MICHAEL GREEN suffered injuries.

Mr. Green remained under medical care in Lafayette from the date of the crash at least through the trial of this matter in May, 1988. Due to residual disabilities from his injuries, Mr. Green received assistance from the Louisiana Vocational Rehabilitation office, and retraining for a new job at Lafayette Regional, a state trade school. Subsequently, he obtained employment within his physical limitations at a Lafayette company.

On November 25, 1985, Mr. Green filed this action before the Louisiana 15th Judicial District Court, Parish of Lafayette. The defendants answered and the compensation carrier, intervened. Trial without jury was concluded on May 4, 1988, after which all parties submitted Post-Trial Memoranda. The Judge found INDUSTRIAL HELICOPTERS liable pursuant to Louisiana Civil Code Article 2317. Judgment was entered on July 8, 1988.

Plaintiff and intervenor filed appeals seeking an increase and re-apportionment of damages. INDUSTRIAL HELICOPTERS filed an Answer to Appeal, asserting state law defenses to dismiss plaintiff's claims and/or reduce the damage award. On April 18, 1990, the Louisiana Court of Appeals, Third Circuit sustained liability pursuant to Article 2317 and increased the damage award. INDUSTRIAL HELICOPTERS filed an Application for Re-hearing on May 2, 1990, *for the first time raising maritime law.* The Application was refused on May 22, 1990 and defendant sought writs. Due to a conflict between panels of the lower court, the Louisiana Supreme Court summarily remanded for further proceedings. The Third Circuit, *en banc,* on March 13, 1991, held that Article 2317 was precluded by maritime law. MICHAEL J. GREEN sought relief and the Supreme Court reversed, holding that the dispute was more local than maritime and that the parties were to be governed by local law. The court below found no support for defendant's claim that the relief provided by Article 2317 was repugnant to maritime law, or that it impermissibly impairs maritime uniformity.

SUMMARY

The dispute in this matter is essentially local and involves maritime law only by virtue of the fortuitous circumstance of the mechanical failure occurring while the helicopter was over navigable waters. The court below has correctly determined that state statutory remedies are available in disputes between its citizens in which there is a strong state interest, even though the dispute is also cognizable under maritime law. This Court has already held that a state may apply its laws to its citizens while on the high seas *Skiriotes v. Florida,* 313 U.S. 69, 61 S.Ct. 924 (1941); that it may exercise its police powers in marine venues *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 93 S.Ct. 1590, 36 L.Ed.2d 280 (1973); and that its laws may supplement (or actually preempt) maritime law where there is a great state interest in the dispute *Romero v. International Term. Oper. Co.*, 358 U.S. 354, 79 S.Ct. 468, 3 L.Ed.2d 769 (1959). The court below properly found that Louisiana has a great interest in the application of its law to this dispute, and that in doing so, it does not impermissibly prejudice the characteristics of maritime law, nor does it impair any required uniformity. This Louisiana non-maritime worker, injured in an accident in a Louisiana helicopter over navigable waters off Louisiana's shores, while in transit from a fixed oil production platform on the Outer Continental Shelf may assert a cause of action under Louisiana law. Since there is no federal statute or principle of maritime law that prohibits the type of state liability asserted here, there is no substantive interference with maritime law. Accordingly, this case does not warrant discretionary review.

ARGUMENT

The decision below expressly addresses the interplay between a Louisiana tort statute and federal maritime law with respect to recovery for personal injuries. As described by the court below:

> The narrow question presented in this case is whether Louisiana Civil Code article 2317, which imposes liability for injury causing things in one's custody, is applicable in a case cognizable in admiralty but brought in a Louisiana state court pursuant to the "savings to suitors" clause of the Judiciary Act of 1789 as amended.[1] (Appendix A, p. A-1)

That court held that the plaintiff was entitled to recovery under the statute for injuries he sustained in an offshore helicopter accident. The court below concluded that:

> [T]here is no applicable contrary federal legislation and that La. C.C. art. 2317 neither prejudices the characteristic features of the general maritime law nor interferes impermissibly with any required uniformity of such law. (Appendix A, p. A-20).

This decision, although it addresses federal maritime law, raises no *substantial* federal questions that bring it within the jurisdiction of the U.S. Supreme Court under 28 USC 1257(3).

To be reviewable by the Supreme Court, a final judgment of a state's highest court must present a "substantial" federal question. *Equitable Life Assurance Society*

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[1] Plaintiff did not plead maritime law, nor did he seek any form of maritime relief. Similarly, the Defendant-Petitioner's pleadings did not raise any maritime issues. Both parties asserted the rights and defenses available to them under state law. This dispute was tried under state law and appealed under state law. Only after the first appeal was lost, did Defendant-Petitioner seek to raise the maritime law exclusion.

v. Brown, 87 U.S. 308, 23 S.Ct. 123, (1902); *Waters-Pierce Oil Co. v. Texas,* 212 U.S. 86, 29 S.Ct. 220, (1908); *Los Angeles Farming & Milling Co. v. City of Los Angeles,* 217 U.S. 217, 30 S.Ct. 452, (1909). In its assessment of "substantiality" this Court should consider whether, in order to safeguard a federally protected right, or to preserve the integrity of federal law, it is necessary to reverse the Louisiana Supreme Court. This case does not deal with issues which this Court has commonly found to involve substantial federal questions.

The ruling of the court below does not involve the federal constitutionality of a state statute, *Goodyear Atomic Corp. v. Miller,* 486 U.S. 174, 108 S.Ct. 1704, 110 L.Ed.2d 158 (1988). It does not involve a state court's failure to address available federal law urged before that court, *Howlett by and through Howlett v. Rose,* 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990). It does not involve comprehensive federal statutory preemption, *Xerox Corp. v. Harris County, TX,* 459 U.S. 145, 103 S.Ct. 532, 74 L.Ed.2d 323 (1984). It does not involve preservation of a federally protected right, *International Longshoreman's Assoc. v. Davis,* 476 U.S. 380, 106 S.Ct. 1904, 90 L.Ed.2d 389 (1986). This case is one involving the construction[2] of state law as permitted by federal maritime law, applied to a particular and local fact situation. *Wilson v. Cook,* 327 U.S. 474, 66 S.Ct. 663 (1946).

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[2]This type of case is to be distinguished from those where the state court has ruled on the validity, or constitutionality, of a statute. This Court will more readily exercise jurisdiction when the validity of statutes are called into question. When the decision rests or can rest on state law grounds, the Court will review the "adequacy" of the state law basis for the judgment before deciding whether to exercise jurisdiction or not.

If the state court judgment is based on state law in lieu of federal law, this Court has not found "substantiality" when the matter is one of harmless or non-prejudicial error, *Chicago, Rock Island & Pacific Railroad Co. v. Wright*, 239 U.S. 548, 36 S.Ct. 185 at p. 186 (1915); or one clearly foreclosed by prior decision of this Court, *Equitable Life, supra.* Inherent in the decisions of this Court are rejection of writ petitions when state courts' analysis of specifically addressed federal questions are correct, *Zucht v. King*, 260 U.S. 174, 43 S.Ct. 24 at 25 (1922). In its review, this Court will not go beyond the state court's analysis of the federal law, i.e., it will not indulge in a reexamination of the state court's factual determinations. Nor will this Court review the state court's construction and application of state law, it will accept them without further analysis.

The determinations of fact and constructions of state law[3] made by the courts below, include:

1. Louisiana has paramount interest in this case due to its actual connections to the dispute involved. The parties were all Louisiana residents, the aircraft was hangared in the state, the contract for the carriage was confected there, the transport originated from and was to return to Louisiana, and the parties expected to be governed by Louisiana law. (Appendix A, p. A-6)

2. The elements of proof required by La. C.C. art. 2317 were property proven by plaintiff's evidence at

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[3] The trial court's determination of liability pursuant to La. C.C. art. 2317, including the defective condition of the aircraft, causal link to injury and damages (Appendix M, pp. A-163-5) was sustained by the state intermediate appellate court below. (Appendix L, pp. A-153-5, Appendix A, p. A-21). The Louisiana Supreme Court did not reconsider these findings.

the trial. Defendant-Petitioner failed to present evidence sufficient to sustain its burden of proof in the state law defenses it asserted at trial. (Appendix N, pp. A-168 to 170, Appendix L, pp. A-153 to 156).

3. La. C.C. art. 2317 creates a form of strict liability which is similar to, and compatible with remedies available under maritime law. Maritime law encompasses principles of strict liability for defective products and unseaworthy vessels. (Appendix A, p. A-15).

These matters are established for purposes of the review by this Court. The federal questions to be assessed by this Court in deciding whether to grant the writ requested herein are:

Was the Louisiana Supreme Court in error in holding:

1. That the Outer Continental Shelf Lands Act, 43 USC 1222, et seq (which would specifically adopt Louisiana law) is inapplicable to this case?

2. That general principles of maritime law are not materially prejudiced by the strict custodial liability provisions of La. C.C. art. 2317?

3. That local state law may be relied on as a supplement to maritime law where there is a great state interest?

4. That La. C.C. art. 2317, when applied to a non-maritime worker injured in a helicopter accident, does not impermissibly interfere with required maritime uniformity?

The court below found no federal legislation applicable in this case which would preclude application of Louisiana law. It found that OCSLA was the only *potentially* applicable federal statute, but that in this case, it was not applicable. (Appendix A, p. A-9). However, if OCSLA is

here applicable, it specifically "adopts state law as surrogate federal law," thus incorporating the very remedy applied by the court below. Justice Watson, of the court below, concurring in the result, opined that OCSLA is applicable to this accident. (Appendix A. p. A-22 to 23). However, this issue alone should not constitute a "substantial" federal question. The application of Louisiana law through operation of OCSLA would have the same result as the lower court's decision. The court below held that Louisiana law applied to this dispute of its own power because it was not excluded by federal leglsiation or maritime law. If the court below erred, and OCSLA properly "adopts" state law herein, the identical result is obtained, and the error is non-prejudicial. It would be a waste of this Court's limited resources to consider this issue unessential to the final outcome. *Chicago, R.I. & P. RR Co., supra,* 36 S.Ct. 185 at p. 186, (1915).

The court below found no general principles of maritime law to prohibit plaintiff from receiving the benefit of Louisiana's substantive law remedy. Admiralty courts have asserted jurisdiction over offshore aircraft accidents; however, maritime law is not directed to governing aircraft operations. (Appendix A. pp. A-13, A-14). Maritime law dealing with vessel passengers has not been fixed by this Court, although the appeals courts permit recovery for negligence. However, plaintiff was not injured aboard a vessel, the traditional subject of maritime law, as the courts have refused to equate helicopters to vessels. Nowhere in maritime law is there a prohibition against a state imposing strict liability against the owner/operator of a defective helicopter located in that state. No general principle of maritime law permits a helicopter owner/operator to fly a defective aircraft and escape liability to his passenger. There is no maritime provision

granting a helicopter owner/operator immunity from state law liabilities when they fly over navigable waters. Maritime law does not grant a limitation of liability to aircraft owners. This Court has addressed offshore helicopter accidents, but only to determine whether the Death on the High Seas Act (DOHSA), 46 USC 761, *et seq.* precludes state *wrongful death* claims. *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978), *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 217, 106 S.Ct. 2485, 88 L.Ed.2d 48 (1986). Petitioner asserts that maritime law includes a "requirement of the proof of negligence", yet fails to offer any jurisprudence to support its assertion. Its failure to offer any supporting citations is due to the absence of any legal support for its position. Maritime law does not require proof of negligence, and it is not materially prejudiced by application of Article 2317 to these parties in this dispute.

The fact that 2317 establishes a form of strict liability does not conflict with any principle of maritime law. As shown above, maritime law includes forms of strict liability. Strict civil liability created by Florida and Virginia pollution control acts has been permitted. *Askew, supra, Steuart Transp. v. Allied Towing Corp.,* 596 F.2d 609 (4th Cir., 1979). In *Protectus Alpha Nav. v. N. Pacific Grain Grow,* 767 F.2d 1379 (9th Cir., 1985), the Court held that the defendant shipowner's violation of Washington statutes prohibiting interference with, or disobeyance of a public fireman, supported a finding of negligence per se. The Court specifically rejected defendant's argument that the application of these Washington state statutes was violative of federal maritime law. *The New York Central No. 18,* 257 F. 405 (2nd Cir., 1919) and *The Chauncey M. Dupew,* 139 F. 236 (2nd Cir., 1905), held

that a New York statute imposing strict liability on vessels moored at the end of wharfs in the East River was enforceable in Admiralty.

There being no maritime repugnance to La. C.C. art. 2317, the court below found that state law supplementation of maritime law is permissible. This Court has permitted supplementation by the States, especially where there is a great state interest in the dispute (Appendix A, pp. A-4 to 7). Maritime supplementation is permissible even where state strict liability law is involved. *Askew, supra,* Florida strict liability for marine pollution. Other cases permitting specific state supplemental remedies or regulation include: *Red Cross Line v. Atlantic Fruit Company,* 264 U.S. 109, 44 S.Ct. 274 (1923), New York law of specific performance of an arbitration clause; *Clyde Mallory Lines v. Alabama,* 296 U.S. 261, 56 S.Ct. 194, 80 L.Ed. 215 (1935), Alabama law creating port safety fees; *Kelly v. Washington,* 302 U.S. 1, 58 S.Ct. 87, 82 L.Ed. 3 (1937), Washington State's vessel seaworthiness and safety regulations; *Just v. Chambers,* 312 U.S. 383, 61 S.Ct. 687 (1941), Florida statute permitting survival actions; *Skiriotes, supra,* Florida sponge harvesting regulations; *Wilburn Boat Co. v. Fireman's Fund Ins. Co.,* 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337 (1955), Texas insurance laws limiting defenses from breach of insured's warranty; *Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960), Detroit city smoke abatement ordinance; *Tallentire, supra,* citing general principles allowing supplementation but holding that DOHSA statutorily preempts a Louisiana wrongful death action. See too: *Brockington v. Certified Elec. Co.,* 903 F.2d 1523 (11th Cir., 1990), cert. den., 111 S.Ct. 676 (1991), Georgia Worker's Compensation Act excludes general maritime remedies to a

non-maritime worker injured while a passenger on a boat; *Pacific Merchant Shipping Assn. v. Aubry,* 918 F.2d 1409 (9th Cir., 1990), cert. den., #91-349, June 11, 1992, California overtime wage laws applied to seamen on vessels on the high seas but whose work was primarily involved in local pollution control work. There is no error, nor significant federal question, in state law supplementation of federal maritime law. It is clearly permissible where a state has a great interest in the dispute and neither federal statutory mandate nor principles of maritime law prohibit the state remedy in this case.

Lastly, the court below found that the application of La. C.C. art. 2317 in this case does not unduly impair requirements of uniformity in maritime law. Decisions of this Court have recognized that the need for uniformity still permits a wide scope of state regulations of maritime matters. Principles of federal/state comity are no less a part of maritime law than uniformity. The need for uniformity in maritime law is not as great in disputes only peripherally maritime. (Appendix A. pp. A-18 to 20). Since maritime law is not a complete. independent body of law, it is subject to supplementation by local law. Justice Frankfurter, in *Romero, supra,* 79 S.Ct. 468 at 480., wrote that:

> . . . to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the States and National Government in their regulation of maritime commerce.

The Supreme Court in *Just, supra,* 61 S.Ct. 687 at 691 (1941) has further explained that:

> . . . it is not a principle of our maritime law that a court of admiralty must invariably refuse to

> recognize and enforce a liability which the State has established in dealing with a maritime subject. 312 U.S. at 387-8

Maritime law has adopted the "interest test" in determining questions where there is a conflict-of-law with applicable local laws. *Hellenic Lines, Ltd. v. Rhoditis,* 398 U.S. 306, 90 S.Ct. 1731 (1970). Where a dispute is one of essentially local concern, local law should apply. *Pacific Merchant, supra,* 918 F.2d at 1424-6. This Court has held that where a carpenter on a vessel, but whose activities had no "direct relation to navigation or commerce", suffers an injury, the application of local law to his claim for relief was permissible. *Grant Smith-Porter Ship Co. v. Rohde,* 257 U.S. 469, 42 S.Ct. 157 (1922). This Court found local law would not "interfere with the proper harmony or uniformity of [maritime] law." This Court specifically noted the local flavor of the dispute and the lack of *direct* involvement in maritime commerce, the stuff of traditional maritime concern.

> the parties contracted with reference to the state statute; their rights and liabilities had no direct relation to navigation, and the application of the local law cannot materially affect any rules of the sea whose uniformity is essential. 42 S.Ct. 157 at 158.

Here, plaintiff was an oil and gas meter technician involved in work on fixed offshore platforms governed by OCSLA. His work, and his worksite were not maritime. *Herb's Welding, Inc. v. Gray,* 470 U.S. 414, 105 S.Ct. 1421 (1985). The Court below has held that the parties expected to be governed by Louisiana law. In fact both parties chose to proceed herein through trial and initial appeal, solely under Louisiana law. (Appendix A, p. A-6).

The interests and activities involved do not involve traditional maritime commerce. The local interests are of more significance and local law should have been applied. This case is not significantly maritime to present any material impairment of uniformity.

CONCLUSION

This Court will refuse to accept jurisdiction in cases where the decision below is based on state law which does not involve *substantial* federal questions. Questions of non-prejudicial error, questions which are governed by clear precedent, and questions which have been correctly analyzed by the state court below are *not substantial.* The lower court's rejection of OCSLA as a source for the application of Louisiana law, if an error, was harmless and non-prejudicial. The lower court's use of a supplemental state remedy was based on clear precedent from this Court. The lower court's determination that 2317 is neither repugnant to maritime law nor an impairment to necessary uniformity was subjected to a correct analysis of federal law. The four (4) federal questions presented in this case are not substantial. Since the non-federal questions are not subject to review in this Court, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

KARL W. BENGTSON
Louisiana Bar #2942
SHELTON AND LEGENDRE
Post Office Drawer 52548
Lafayette, Louisiana 70505
(318) 233-7084
Attorneys for Plaintiff-Respondent, Michael J. Green.

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